

ST 97-33

TAX TYPE: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	Docket #
v.)	IBT #
)	NPL #
TAXPAYER)	
as responsible officer of)	Linda Olivero
CORPORATION)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Todd Turner of Sorling, Northrup, Hanna, Cullen and Cochran, Ltd. for TAXPAYER.

Synopsis:

The Department of Revenue ("Department") issued a Notice of Penalty Liability ("NPL") to TAXPAYER ("respondent") pursuant to section 13 1/2 of the Retailers' Occupation Tax Act ("ROTA")¹. The NPL alleges that the respondent was an officer or employee of CORPORATION ("corporation") who was responsible for willfully failing to pay the corporation's retailers' occupation taxes ("ROT"). The respondent timely protested the NPL. An evidentiary hearing was held during which the respondent presented various documentary evidence and

¹. At the time that the tax liability became due, the provision was Ill.Rev.Stat. 1987, ch. 120, par. 452 1/2. This section was replaced by section 3-7 of the Uniform Penalty and Interest Act (35 ILCS 735/3-7) effective January 1, 1994.

testimony from four witnesses. The respondent also submitted evidence depositions of four other witnesses. After reviewing the record, it is recommended that this matter be resolved in favor of the respondent.

Findings of Fact:

1. The corporation was started in 1983 for the purpose of operating restaurants. (Respondent Ex. #15; Tr. p. 66).

2. The respondent was the secretary for the corporation. She was not a shareholder nor a director. (Respondent Ex. #15; Tr. pp. 72-73; SHAREHOLDER B Dep. p. 8).

3. The following people were the shareholders of the corporation: SHAREHOLDER A, SHAREHOLDER B, SHAREHOLDER C, and SHAREHOLDER D. (Tr. p. 70; SHAREHOLDER B Dep. pp. 4-5).

4. The four shareholders were also the directors of the corporation. (Respondent Ex. #15).

5. SHAREHOLDER A ("SHAREHOLDER A") was the president of the corporation. (Respondent Ex. #15; Tr. p. 71).

6. Even though the respondent was an officer, she was not an employee of the corporation and never received compensation from the corporation. (Tr. pp. 72-73; SHAREHOLDER B Dep. p. 7).

7. The respondent was an employee of a company known as COMPANY, which was initially owned by SHAREHOLDER B ("SHAREHOLDER B"). The respondent worked as a secretary for SHAREHOLDER B and received a salary from COMPANY. (Tr. pp. 68-69, 73; SHAREHOLDER B Dep. pp. 7-8).

8. The respondent and SHAREHOLDER A had signature authority on the corporation's bank accounts. (Respondent Ex. #9, 10; Tr. p. 82).

9. While the corporation's restaurants were under construction, the respondent had the responsibility of accumulating the payables and disbursing funds that were necessary for the construction. Before she would disburse the funds, the respondent would obtain approval from either SHAREHOLDER A or SHAREHOLDER B. (Tr. pp. 74-76, 101; MANAGER Dep. pp. 23-24).

10. After her construction-related duties were completed, the respondent's duties for the corporation were limited to occasionally signing checks or documents when SHAREHOLDER A was unavailable, such as when SHAREHOLDER A was on vacation or not at work. (Tr. pp. 82-85, 106, 108; MANAGER Dep. pp. 12, 14-15).

11. Other than the construction-related duties, the respondent did not perform regular duties for the corporation. She did not perform her work in the corporation's office where the corporation's books and records were located. She performed her work for the corporation in her COMPANY office. When SHAREHOLDER A was unavailable and checks or documents needed to be signed, other employees of the corporation would bring them to the respondent at her COMPANY office. (Tr. pp. 32, 81-82, 131; MANAGER Dep. pp. 14-15).

12. The corporation had two bookkeepers. They were responsible for calculating the amount of the ROT, preparing the ROT returns, and preparing the checks to be sent with the returns. (Tr. pp. 83-84; MANAGER Dep. pp. 8-9; 25).

13. The respondent did not participate in the preparation of the ROT returns. (Tr. pp. 84, 94-95; MANAGER Dep. p. 9).

14. The respondent occasionally signed the ROT returns on behalf of the corporation. She signed the returns for the following months:

August, September, October and November of 1985; October of 1986. BOOKKEEPER signed all of these returns, except October 1985, as the preparer. (Respondent Ex. #21; Tr. pp. 133-134).

15. The respondent signed the ROT returns and the checks for the convenience of SHAREHOLDER A when he was unavailable. (Tr. pp. 84-85, 106-108; MANAGER Dep. pp. 12, 18-19).

16. SHAREHOLDER A would oversee the day-to-day operations of the corporation's restaurants. SHAREHOLDER A reviewed and approved all purchases and decisions regarding the corporation. He reviewed the financial information, including the information used to prepare the tax returns. (Tr. pp. 19-22, 40-41, 107; MANAGER Dep. pp. 7, 10-14, 26).

17. MANAGER was the manager/supervisor for one of the corporation's restaurants until April 1, 1986. MANAGER would review the corporation's expenditures with SHAREHOLDER A and receive his approval for each expense. (Tr. p. 107; MANAGER Dep. pp. 6, 13).

18. The respondent did not have authority to hire or fire employees. She did not participate in the management of the corporation. She had no management duties and no control over the day-to-day operations. (Tr. pp. 74, 99, 104-105; MANAGER Dep. pp. 14-16; SHAREHOLDER B Dep. pp. 8-9, 11; SHAREHOLDER D Dep. pp. 9-10).

19. The respondent never participated in any meetings concerning the corporation's operations or financial matters. SHAREHOLDER D testified that he never discussed any business matters with the respondent. (Tr. p. 99; SHAREHOLDER D Dep. p. 12).

20. The respondent had no decision-making authority regarding the corporation's financial matters. She did not participate in

decisions concerning the payment of creditors. (Tr. pp. 101-104; SHAREHOLDER B Dep. p. 9; SHAREHOLDER D Dep. pp. 20-21).

21. The corporation discontinued the ROT taxes as of December 31, 1986. (Respondent Ex. #12).

22. On April 8, 1992, the Department issued NPL number 5133 to the respondent that proposed a total penalty liability of \$39,512.45, including tax, interest, and penalty, for failure to pay ROT for December 1986. The NPL was admitted into evidence under the Director's Certificate. (Dept. Ex. #1).

Conclusions of Law:

Section 13 1/2 of the Retailers' Occupation Tax Act provides in part as follows:

"Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who wilfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon;" Ill.Rev.Stat. 1987, ch. 120, par. 452 1/2.

An officer or employee of a corporation may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the ROT returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

Under section 13 1/2, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the

correctness of the penalty due.² See Branson v. Department of Revenue, 168 Ill.2d 247, 260 (1995). Once the Department presents its *prima facie* case, the burden shifts to the respondent to establish that one or more of the elements of the penalty are lacking, i.e., that the person charged was not the responsible corporate officer or employee, or that the person's actions were not wilfull. Id. at 261. In order to overcome the Department's *prima facie* case, the allegedly responsible person must present more than his or her testimony denying the accuracy of the Department's assessment. A. R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 833-34 (1st Dist. 1988). The person must present evidence that is consistent, probable, and identified with the respondent's books and records to support the claim. Id.

In this case, the Department's *prima facie* case was established when the Department's certified record relating to the penalty liability was admitted into evidence. In response, the respondent contends that she was not the responsible corporate officer.

For guidance in determining whether an officer or employee is responsible under section 13 1/2, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue

². The relevant portion of section 13 1/2 provides as follows: "The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty due under this Section. Proof of such determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or any legal proceeding and shall be *prima facie* proof of the correctness of the penalty due, as shown thereon." Ill.Rev.Stat. 1987, ch. 120, par. 452 1/2.

Code (26 U.S.C. §6672).³ See Branson at 254-56; Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19, 29-30 (1985). These cases state that the critical factor in determining responsibility is whether the person had significant control over the corporation's finances. See Purdy Co. of Illinois v. United States, 814 F.2d 1183, 1186 (7th Cir. 1987) Responsibility is generally found in high corporate officials who have control over the corporation's business affairs and who participate in decisions concerning the payment of creditors and the disbursement of funds. Monday v. United States, 421 F.2d 1210, 1214-1215 (7th Cir. 1970), cert. den. 400 U.S. 821. Nevertheless, holding a corporate office does not, per se, create a duty to collect, account for, and pay over the withheld taxes. Id.

The courts have found that the following facts are relevant in determining whether a person is responsible: (1) identity of the officers, directors, and shareholders of the corporation; (2) duties of the officer as outlined by the corporate by-laws; (3) ability of the individual to sign checks of the corporation; (4) identity of the individuals who were in control of the financial affairs of the corporation; and (5) identity of the individuals who hired and fired employees. Schwinger v. United States, 652 F.Supp. 464, 467 (E.D.N.Y. 1987), citing Silberberg v. United States, 524 F.Supp. 744, 747 (E.D.N.Y. 1981). Day to day control of the operations is not necessary for finding liability. Id.

³. This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

In the present case, the evidence indicates that the respondent was not responsible for preparing and filing the ROT returns. The fact that the respondent was the secretary for the corporation does not create per se liability. Monday at 1214. The evidence established that the respondent had no decision-making authority regarding the corporation's financial matters and did not participate in decisions concerning the payment of creditors. She did not participate in the management of the corporation. She occasionally signed the ROT returns and the checks for the convenience of SHAREHOLDER A when he was unavailable. The respondent lacked sufficient control over the finances of the corporation in order to find that she was a responsible officer.

Recommendation

Because the respondent has presented sufficient evidence to overcome the Department's *prima facie* case, it is recommended that the Notice of Penalty Liability against her be dismissed.

Linda Olivero
Administrative Law Judge

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